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Power to Appoint to Office--Its Location and Limits

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THE POWER TO APPOINT TO OFFICE; ITS LOCATION AND LIMITS[1]

AT no other time in the judicial history of this country, if the evidence of the reported cases is to be relied upon, have there been so many and so bitter contests over all of the questions growing out of the title to public offices, as during the last ten or twelve years. This is undoubtedly largely accounted for by the fact that within that period a large number of the states have put in operation radically changed methods of conducting elections, based upon or practically incorporating what is popularly known as the Australian ballot system. In making these changes, the several states have retained enough of general similarity to attest the likeness of their respective methods to the original type, but at the same time they have introduced so much of local variation and addition as to give rise to a great number of new and perplexing questions of interpretation and application.

During this same period, also, an apparently increasing anxiety to secure the emoluments of office has given birth to numerous contests over the title to official salaries and fees; and it is doubtless true that this seemingly sharpened appetite for the spoils of office has lain at the foundation of much other litigation in which the right to salary or fees was only incidentally involved.

Among the many questions relating to public office which in this period have thus attracted the attention of our courts, is the one to which attention will be given in this paper,—the question, Where does the power to appoint to public office reside, and what are the limitations which attend its exercise? It may seem, on its first statement, that there ought to be but little room for doubt upon this question, but the fact that it has proven to be one of great inherent difficulty, as well as the paramount importance of the question in

[1] The substance of this article was originally delivered as an address before the Michigan State Bar Association. In some places its original form as a spoken address has been retained.

itself, are the excuses for its discussion at the present time.

Lying immediately back of this question, and closely allied to it, is the question which I shall content myself with suggesting but not discussing;—Whether under the system of republican government to which we are pledged, and which the United States is bound to guarantee to every State, there exist any limitations upon the power of the people to exercise the power of appointing their officers generally, rather than electing them. Whether, in other words, it is competent for the people to provide for one or two great elective officers who shall themselves appoint the residue of the vast number of officers required, instead of leaving them all to be elected at popular elections.

Passing this question by as one of no present consequence, at least, I shall assume that we will all agree that the power to determine what officers shall be chosen to exercise the functions of government, and by what method they shall be chosen—whether by popular election or by appointment by other officers,—is vested in the people themselves; and that in framing their systems of government and forming their constitutions, they may make such provisions and adopt such methods, as to them may seem expedient and proper. For present purposes, therefore, I shall assume that the people, in their constitutions, may determine what officers shall be appointed, and how, and by whom; and that wherever express provisions of this sort are found, they will be deemed conclusive.[1] Strange as it may perhaps seem, however, many of our state constitutions, the constitution of Michigan included, contain exceedingly meagre provisions upon this subject, and the question is therefore open for discussion: What provisions are to be implied?

For the purpose of clearing the ground for the main subject, it may be well at the outset to consider briefly some incidental and collateral phases which the courts have had occasion to deal with.

I.

And, *first*, it is doubtless true that the power to make some appointments may be deemed to be an incident of certain larger powers expressly conferred, "as, for instance," to use the language of Judge Coffey, of the supreme court of Indiana,[2] "the appoint-

[1] Thus where the constitution expressly provides that officers shall either be elected or appointed by the governor, a statute attempting to confer appointing power upon the supreme court is void: State *v.* Hocker, 39 Fla. 477, 22 So. Rep. 721, 63 Am. St. Rep. 174.

[2] State *v.* Denny, 118 Ind. at p. 389. See also State *v.* Barker (1902), — Iowa —, 89 N. W. Rep. 204.

ments made by judicial officers in the discharge of their official duties or the appointments made by the general assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body, and the like." "Such appointments," continues the same judge, "by the several departments of the state government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch."

II.

In the *second* place it may be noticed that, in Michigan, at least, since the decision in *People* v. *Hurlbut*,[1] and *People* v. *Detroit*,[2] the right of local self-government forbids such a construction of the general appointing power conferred upon any state officer as would permit the permanent appointment by him of purely local officers. Whether a temporary and provisional appointment might be made to operate until the office could be filled by the proper local authorities, was a question much discussed in *People* v. *Hurlbut*, and upon which, as there presented, the court was equally divided. That such an appointment may be made, however, was asserted in the more recent case of *Moreland* v. *Millen*,[3] though it was found that no such exigency appeared as to justify its exercise. The reasoning sustaining the power was also approved in *Luehrman* v. *Taxing District*,[4] and in *State* v. *Irwin*,[5] and *State* v. *Swift*,[6] the power to make such provisional appointments was affirmed, though this decision was coupled with views respecting the right of local self-government, which cannot be reconciled with those prevailing in Michigan.

III.

In the third place our attention may be called to that phase of the subject presented by the question, much discussed of late, whether the power expressly conferred upon the legislature by the constitution in some states to prescribe the *manner* of appointing is sufficient to authorize the legislature to make the appointment itself.

In *State* v. *Kennon*,[7] which arose in 1857, the question was vig-

[1] 24 Mich. 44, 9 Am. Rep. 103.

[2] 25 Mich. 228.

[3] 126 Mich. 381, 85 N. W. Rep. 882.

[4] 70 Tenn. 425, 441.

[5] 5 Nev. 111.

[6] 11 Nev. 128.

[7] 7 Ohio St. 546.

orously discussed. The constitution of Ohio, after providing for certain officers, proceeded to declare that—

"The election and appointment of all officers . . . not otherwise provided for by this constitution . . . shall be made in such manner as shall be directed by law; but no appointing power shall be exercised by the general assembly except as prescribed in this constitution, and in the election of United States senators."

The constitution also provided that—

"The directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct."

Under this constitution the legislature passed an act appointing Kennon and two others as a board to supervise the construction of the new state house; and also an act by which this board was authorized and directed to appoint directors of the state penitentiary. In an action of quo warranto against Kennon and his associates, it was contended that the power conferred upon the legislature to direct the manner in which officers should be elected or appointed, was equivalent to authority to make the appointment itself. Speaking of this contention, the court, by Brinkerhoff, J., said:—

"To make good this claim it must be made to appear that the power to direct the 'manner' the mode, the way, in which an act shall be done, and the power and authority to do the act itself, are one and the same thing. But that they are not identical or equivalent to each other, is too clear for argument, and almost too clear to admit of illustration. To prescribe the *manner* of election or appointment to an office is an ordinary legislative function. To make an appointment to office is an administrative function. And under a constitution in which the philosophical theory of a division of the powers of government into legislative, executive and judicial, should be exactly carried out in detail, the power of prescribing the *manner* of making appointments to office would fall naturally and properly to the legislative department; while the power to make the appointments themselves would fall as naturally and properly to the executive department. This exact adherence to theory, however, is seldom, if ever, found in any frame of government; and we refer to the distinction simply by way of reply to the claim on behalf of defendants, in argument, that the power to prescribe the *manner* of appointments includes the power of appointment itself, and to show that they are acts and powers wholly different and distinct from each other.

"How far the general assembly may go, and just what it may or may not do, in the exercise of the power here conferred, to *direct the manner* of the election or appointment of directors of the penitentiary, are questions not before us. We have not considered them, nor do we intend to attempt to answer them. It will be time enough to do so, when they are presented in a case actually pending before us. But conceding, for the sake of the argument, that

it would be competent for the legislature to constitute a board of commissioners to hold office during life even, for the appointment of directors of the penitentiary, it is clear that the legislature cannot, under the constitution, itself appoint and designate the members of such board. They must be either elected by the people of the state, or appointed by some constitutional agency other than the general assembly."

Swan, J., in the same case, used the following language:—

"Upon this question, it seems to me only necessary to refer to the plain words of the constitution. It provides in the first place, that 'the election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution or the constitution of the United States, shall be made in such manner as may be directed by law.' Now, providing by law the manner in which an appointment shall be made, and the making of the appointment itself, are two different things; the first is pointing out the mode in which the thing shall be done, and the other is doing the thing itself; the one is legislative and directory, the other administrative."

The same question subsequently arose in Indiana, in 1888, in the case of *State, ex rel. Jameson* v. *Denny*.[1] The constitution there provided (§ 1, Art. 15), that—

"All officers whose appointments are not otherwise provided for in this constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law."

The court after quoting with approval the language in *State* v. *Kennon*, proceeded to say:—

"We think it plain that the power to provide by law the *manner* or *mode* of making an appointment, does not include the power to make the appointment itself. As has been said, by § 1, Article XV., the general assembly has the right to appoint such officers as it had the right by the law in force at the time of its adoption to select, and by the terms of that section it also has the right to prescribe by law the manner in which officers for whose appointment no provision is made in the constitution, shall be appointed. What, then, is the limit of the legislative power to appoint to offices created by statute, or is there any limit to such power? If there is no limit, then the general assembly may appoint all the officers created by statute, from the attorney general of the state down to the smallest township officer, for they are all the creatures of the statute. It may appoint the board of county commissioners, the township trustees, county superintendents, and even road supervisors. It may create offices without limit, and fill them with its own appointees.

"In the light of the contemporaneous history of the constitution, we do not think it will be seriously contended that the framers of that instrument intended to confer upon, or leave with, the general assembly any such power. Where, then, is the limit? Whatever the limit may be, it is clear to us that it has no power to fill, by appointment, a local office like the one now under consideration. As the right to prescribe by law the manner of appointing to

[1] 118 Ind. 382, 21 N. E. Rep. 252, 4 L. R. A. 79.

a new office created by the legislature does not carry with it the right to make such appointment, we know of no provision in the constitution under which such right can reasonably be asserted. It is believed that this conclusion accords with the practical construction heretofore placed upon our constitution."

So again in *State* v. *Peelle*,[1] the court reiterated the same doctrine, saying—

"That giving the legislature power to prescribe by law the manner of electing officers does not confer the power to elect, and that there is a manifest distinction between providing the mode of doing a thing and doing the thing itself."

Later cases in Indiana have recognized the same distinction; and a recent case in Missouri [2] strongly re-enforces it.

On the other hand, in a leading case in Maryland:—*Mayor of Baltimore* v. *State*,[3] it appeared that the constitution of that state conferred upon the governor the appointment of all officers not otherwise provided for "unless a different mode of appointment be prescribed by the law creating the office." The legislature, having passed an act providing for a board of officers, and having named the officers in the body of the act, it was contended that the section of the constitution above referred to gave to the legislature, in creating an office, power only to prescribe the *mode* of appointment and could, by no legitimate rule of construction, be interpreted to grant the power to the legislature to make the appointment itself. But the court declined to adopt this construction, saying:—

"It is conceded that the legislature was not under any obligation to confer the power of appointment on the executive; by this clause of the constitution the power was placed there, in the event of a different mode not being prescribed in the law. But, it is said, it ought to have been delegated to the people or local authorities of the city of Baltimore. In the absence of any such requirement of the legislature, we do not perceive that they were under a duty to make such delegation of the appointing power. The constitution surely designed to repose some discretion in the legislature, both over the mode of appointment and the propriety and necessity of passing any law on the subject to which the exercise of the power might relate. It seems difficult to suppose that the people, through the constitution, would intrust to that branch of government nearest to the source of power the right to create an office, and to indicate others to appoint the officers, and be unwilling to place the appointment with the legislature itself."

Substantially the same question was involved in Michigan in the

[1] 121 Ind. 495.

[2] State *v.* Washburn (1902), — Mo. —, 67 S. W. Rep. 592.

[3] 15 Md. 376, 74 Am. Dec. 572.

case of *People* v. *Hurlbut*,[1] though its scope was somewhat more limited. Section 14 of Art. XV, of the constitution of Michigan (Art. XV being the article entitled Corporations) provides that—

"All judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct."

All of the judges assumed, and Campbell, Ch. J., expressly declared, what seems sufficiently obvious from its location, that this provision applies only to municipal officers, and does not operate upon offices generally. The exigencies of the case did not require a decision upon the question, but part of the judges referred to it, and Christiancy, J., said:—

"The next objection to the validity of the act is, that the power of the legislature (under § 14, Art. XV), is confined to directing whether officers other than judicial, in cities and villages, shall be elected or appointed, and at what time and in what manner the election or appointment shall be made; that in thus directing, their power is exhausted, and they cannot make the appointment themselves.

"This argument is not based upon the ground that the provisions of this section were intended to confine the power of making the appointment to the common council of the city or to any other local authority for which only it was intended the legislature should provide; but it goes upon the assumption that, even admitting the power of the legislature to provide for an appointment otherwise than by the local authorities of the city, still the legislature could not itself make the appointment in the manner they have undertaken by this act to make it; their power being limited to directing the time and manner in which it should be made.

"Though this argument may seem plausible, I do not think the conclusion is so clear or free from doubt as to authorize us to declare the act void on this ground. If the legislature had the power to provide the time and manner of the appointment, and were not confined to providing for the appointment by the local authorities, then they had the power to provide that it should be made by the governor with or without the consent of the senate, or by the legislature in joint convention, or finally, by the legislature in the very form and manner which was adopted. And if they had the power to direct that it should be made in this way, it would be very difficult to give any substantial reason why they could not proceed to make the appointment as they did, without first passing an act providing that it should be so made. Such an act would be but a legislative determination that the appointment should be so made; and the actual making of it in this way shows the like legislative determination. A similar exercise of power by the legislature has been upheld by the supreme court of New York."[2]

Many other cases upon this subject might be referred to, but these

[1] 24 Mich. 44, 9 Am. Rep. 103.

[2] People *v.* Bennett, 54 Barb. 480.

are sufficient to show the wide divergence of judicial opinion, and space will not permit, nor does the subject justify, a fuller treatment of it.

IV

Passing now, *lastly* to the main point to be considered, the question is this: When the constitution contains no provision regulating the matter of appointments, where is the power of appointment located? Does it belong exclusively to the executive, or to the legislative or to the judicial department? May it properly be conferred upon either branch?

No serious claim has ever been made, so far as I am aware, that the power of appointment generally is a judicial function, though, as will be noticed later on, the right to confer some appointing power upon the judiciary has been expressly recognized. In Michigan, however, it is expressly denied to the judiciary by the language of the constitution.[1] Is it then an exclusively executive function, or may the legislature exercise it? Around this question the battle has been waged.

The constitution of Michigan, like that of most of the states, provides (Art. III), that—

"The powers of government are divided into three departments: The legislative, executive, and judicial."

And further that—

"No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution."

The constitution of Michigan nowhere expressly locates the general appointing power, except for the filling of vacancies, in which cases the governor must act. As a matter of fact, the statutes providing for offices in this state have very generally vested the power of appointment in the governor. But is it necessarily an executive function? If it is, then under the constitutional provisions last referred to, the legislature could not make appointments itself; if it is not, the legislature may have the power.

I repeat then, Is appointment to office intrinsically, inherently and necessarily an executive function?

Thomas Jefferson, in a letter to Samuel Kercheval, dated July 16, 1816, said:—

"Nomination to office is an executive function. To give it to the legislature, as we do in Virginia, is a violation of the principle of the separation of

[1] § 10, Art. VI.

powers. It swerves the members from correctness by temptation to intrigue for office for themselves, and to a corrupt barter for votes, and destroys responsibility by dividing it among a multitude."

In *Taylor* v. *Commonwealth*,[1] a writ of error had been sued out to review the act of a county court in appointing a clerk of the court. A question was made whether the act was, in its nature, such an one as could be reviewed under this writ. The court held that it was not, and Robertson, Ch. J., said:—

"The appointment of a clerk is not, strictly speaking, a judicial act. Appointments to office are intrinsically executive. And although the constitution has confided to the courts the appointment of their own clerks, still the nature of the power is not changed. It is essentially executive, whensoever, or by whomsoever it may be exercised. It is as much executive when exercised by a court as by the governor. It is the prerogative of appointing to office, and is of the same nature, whether it belongs to a court or to a governor. The appellate jurisdiction of this court is judicial. We can revise that only which is judicial."

In *Achley's Case*,[2] it appeared that the law gave to the common council of cities the power to appoint commissioners of deeds, and Achley had been so appointed by the common council of the city of New York. The mayor of the city undertook to veto this appointment under his authority to interpose his veto against legislative acts; but the court held that this was not such a case, saying:—

"The exercise of the power of appointment to office is a purely executive act; and when the authority conferred has been exercised, it is final, for the term of the appointee."

In *State, ex rel. Coogan* v. *Barbour*,[3] it appeared that the common council of the city was authorized to elect a city attorney. A meeting was duly held, a vote was taken and the relator Coogan, having received a majority of the votes, was declared elected. A motion was soon afterwards made to treat the first ballot as void and to declare defendant Barbour elected. This motion was adopted, and the question was which of these two persons was elected. The court held that Coogan was elected, on the ground that the election or appointment was an executive act, and when once performed was final.[4] "Appointments to office," said the court, "by whomsoever made are intrinsically executive acts." Similar declarations are also to be found in many other cases.[5]

[1] 3 J. J. Marshall (Ky.) 401.

[2] 14 Abbott's Prac. Rep. 35.

[3] 53 Conn. 76, 55 Am. Rep. 65.

[4] Upon this point, compare Attorney General *v.* Oakman, 126 Mich. 717.

[5] Thus in Murphy *v.* Webster, 131 Mass. 482, Gray, Ch. J. says: "The power to appoint and the power to remove officers are in their nature executive powers."

No one of these cases however, fairly presented the question now in issue, but in 1888, there began a somewhat remarkable series of cases before the supreme court of Indiana, in which nearly all possible aspects of it received consideration.

In the first of these cases, *State, ex rel. Jameson* v. *Denny*,[1] it appeared that the legislature had passed an act providing for the appointment of a board of public works in every city of fifty thousand inhabitants or more, and declaring that such board should be elected by the legislature in joint convention. Pursuant to the terms of this act, the general assembly had elected a board of public works for the city of Indianapolis, but the mayor of the city had refused to recognize them, and this action was brought to compel him to do so. Three of the judges wrote opinions, but the question raised may be shown by an extract from the leading opinion of Judge Coffey:—

"Admitting for the time being that the act in question is otherwise valid, it is insisted that under our constitution the general assembly had no power to elect or appoint the appellants, and that so much of the act as attempts to confer on it such power is in conflict with the constitution and is therefore void. It is claimed that the appointment to an office is an executive function, and that by the terms of our constitution the general assembly is prohibited from filling an office created by it, unless such office is connected with the duties imposed upon it as a legislative body. This contention arises out of the provision of § 1 Art. III., of the constitution which is as follows: 'The powers of the government are divided into three separate departments; the legislative; the executive, including the administrative; and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another except as in this constitution expressly provided.'"

The learned judge then proceeded to define each power, saying:—

"Legislative power is the power to make, alter and repeal laws and is vested in the general assembly; the judicial power is the power to construe and interpret the constitution and the laws and make decrees determining controversies, and is vested in the courts. The executive power is the power to execute the laws, and is vested in the governor of the state, the administrative officers of the state, counties, townships, towns and cities. Then to which one of these departments does the appointment to office belong?"

Generally, proceeded the same judge, the appointment to an office is an executive function. It is conceded that the legislature and the judiciary have certain incidental power of appointment, but—

"The appointment to an office like the one involved here, where it is in no manner connected with the discharge of legislative duties, we think involves the exercise of executive functions and falls within the prohibition of §1 Art.

[1] 118 Ind. 382, 21 N. E. Rep. 252, 4 L. R. A. 79.

III of the constitution." . . . . . "In our opinion, so much of the act now under consideration as attempts to confer on the general assembly the duty of appointing or electing to the office now claimed by the appellants, is in conflict with our constitution, and is void. It seeks to confer on that body executive functions which it is prohibited from exercising."

Elliott, Ch. J., wrote a separate opinion in which among other things, he said:—

"The legislature does not, in my opinion, either by express grant or by implication, possess any general and unrestricted appointing power. It is generally agreed that the power of appointment is intrinsically an executive power; it is, at all events, not properly a law-making power. It is one thing to make a place for a man by enacting a law, and another thing to put him in that place. The one thing is purely and intrinsically legislative, the other is not."

The court held the act in question invalid, but its violation of the right of local self-government was also urged against it, and this contention was sustained by a majority of the court. Mitchell, J., dissented, denying the right of local self-government in this case, and asserting the power of the legislature to make the election as it had done.

In the second case, *Evansville* v. *State*,[1] it appeared that the same legislature had provided for a police and fire board in cities having a population of 29,000 or more. The members of the first board were to be elected by the legislature. Under this act, the legislature elected a board for the city of Evansville, but they were refused recognition by the local authorities and this action was brought to compel such recognition. The court held this act also unconstitutional for the reason that it violated the right of local self-government and because the legislature had no power to elect the officers. Upon this latter point, Berkshire, J., who wrote the opinion of the court, said:—

"The power to appoint to office is not a legislative function but belongs to the executive department of the government." "Prescribing the mode of appointment is one thing, making the appointment is another. One is the exercise of the legislative power, the other the exercise of an executive function. As the legislature is limited to the exercise of legislative power, except when otherwise expressly provided, its power ceases when it prescribes the mode of appointment to office, except in cases where express power is given to make appointments." "The legislature may provide by law for the appointment of all officers not provided for in the constitution, but the appointing power must be lodged somewhere within the executive department of the government."

Mitchell, J., dissented.

[1] 118 Ind. 426, 21 N. E. Rep. 267, 4 L. R. A. 93.

In the third case, *State, ex rel. Holt* v. *Denny*,[1] an act similar to the one last considered was involved. This act also was held to be unconstitutional. The chief stress of the opinion was laid upon the right of the municipality to regulate its own affairs, but upon the point now under consideration, the court, by Olds, J., said:—

"Under our system of government, divided into three separate, distinct, co-ordinate branches, the legislative and judicial departments may exercise appointing power to offices peculiarly related to and connected with the exercise of their constitutional functions, and to maintain their independent existence; that is to say, the general assembly may elect or appoint the officers of their respective branches and relating to their department of the government; courts may appoint administrators, guardians, master commissioners, and such officers as are necessary to the free and independent exercise of power conferred by the constitution, but the appointment of officers generally is naturally and properly an executive function."

Mitchell, J. dissented as before.

In *Hovey v. State, ex rel. Carson*,[2] decided in 1889, the question arose as to the power of the legislature to elect trustees for the state asylum for the insane. Judge Mitchell, who had dissented in the three preceding cases wrote the leading opinion, though three other judges also wrote opinions and none of them entirely concurred with Judge Mitchell. Judge Mitchell's position was that the general power to appoint officers is not inherent in the executive or any other branch of the government, but that it is a prerogative of the people to be exercised by them directly or by any department of government to which it had been either expressly or impliedly confided by the constitution. Judge Berkshire contended, as in the previous cases, that the power to appoint to office is an executive function and is lodged with the executive department of the government except where the constitution expressly provides otherwise. All of the judges however, concurred in holding the election valid on the ground that the trustees of the insane asylum had been habitually chosen by the legislature up to the time of the adoption of the present constitution, and that this method was therefore by practical construction brought within the constitutional provision that, "All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as *now is*, or hereafter may be, provided for by law."

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1 118 Ind. 449, 21 N. E. Rep. 274, 4 L. R. A. 65.

2 119 Ind. 395.

At the same term, the case of *Hovey* v. *State, ex rel. Riley*,[1] was decided. This case involved the right of the legislature to elect trustees of the state institution for the education of the blind. This election was sustained. Elliott, Ch. J., who wrote the leading opinion of the court, said:—

"That there is a class of officers that may be appointed by the general assembly cannot now be justly denied and the only question which is still open to debate is, What officers belong to this class? It is our judgment that in view of the provisions of the constitution and the effect given them by practical exposition, the governing officers of all of the benevolent institutions of the state may rightfully be appointed by the general assembly."

It appeared in this case that the right to elect officers of this class had been exercised without question by the legislature ever since the adoption of the present constitution. Treating this practice as a practical exposition of the constitution, the majority of the court sustained the election. Berkshire and Coffey, JJ. dissented.

Later in the same year *State, ex rel. Yancey* v. *Hyde*,[2] was decided.

The legislature at its last session had created the office of "director of the department of geology and natural resources of the state of Indiana," and provided that such director should be, and he was, elected by the legislature. The director was authorized to appoint certain subordinate officers. The governor of the state, disregarding the election by the legislature, treated the office as vacant, and proceeded to fill it by appointment. The governor's appointee named a subordinate officer to fill a position to which another person had been already appointed by the director elected by the legislature, and the action was to try their respective titles. The governor's appointment was held to be valid. Berkshire, J. wrote the leading opinion of the court, insisting, as he had held before, that the power to appoint is an executive and not a legislative function. He said:—

"The said office being a state office, the legislature could not delegate the power to some other state officer to appoint and commission the relator, though that officer may have been duly appointed and commissioned. In so far as the act of the legislature seeks to deprive the executive of the state of his constitutional prerogative to fill by appointment vacancies in the offices named in said act, it is unconstitutional and void."

Mitchell, J. and Elliott, Ch. J., dissented. The latter said:—

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[1] 119 Ind. 386.

[2] 121 Ind. 20.

"I am fully persuaded that the legislature ought not to have the general power to create and to fill offices of its own creation, and that if the opinions of the great thinkers of our country had been given full force it would have no such power; but, while I am persuaded that it should not have this power, my judgment is thoroughly convinced that it does have power to create and to fill a class of offices, and that the office in controversy belongs to that class. I regret the conclusion, but I cannot escape it. I have searched with all possible care, but I can find no decision which sustains the contention of the relator, that the appointing power resides in the governor. I find no conflict but entire unanimity, for in every case that I have seen, it is affirmed that, unless expressly prohibited by constitutional provisions, there is a class of offices which the legislature may create, and fill by appointment."

After considering a number of cases to be hereafter dealt with, Judge Elliott said:—

"The conclusion deducible from these authorities is, so far as it is here necessary to ascertain it, that where the legislature has power to establish a scientific department or to establish any public institution, it has, as an incident of that power, the right to select the means and agencies it deems necessary to carry into effect the law it has enacted."

Still later in the same year, in *State* v. *Peelle*,[1] the court had before it the office of chief of the bureau of statistics. When this office was created the act provided that the governor should appoint, but by an amendment made some time later it was provided that the officer should be elected by the legislature. The legislature elected a person to fill the office, but the governor, deeming this election unauthorized and the office therefore vacant, made an appointment to fill the vacancy. The office in this case differed from most of those dealt with in the preceding cases, in being a general state office, unconnected with any particular municipality, and not concerning any of the state institutions over which the legislature, according to the previous cases, had, by practical construction and long acquiescence, acquired the appointing power. In dealing with this phase of it, the court said:—

"In view of the object of the law and the nature of the office, it is unquestionably a state office and we find upon examination of the laws of other states that offices of this character are not regarded by the legislatures of other states as in any sense legislative offices, coming within the prerogative of the legislature to elect the officers. Having reached this conclusion, the next question for determination is the right of the legislature under the constitution to create a state office and fill it by the general assembly electing the officer. This bring us to the consideration of the power of the general assembly. This must be determined by some general principles."

The court then proceeded to a discussion of the language of the

[1] 121 Ind. 495.

constitution, and particularly of § 1 of Art. XV so often referred to in the preceding cases and said, that—

"Under the new constitution which took effect November 21, 1851, the power to elect state officers whose duties are general and such as the duties of the chief of the Indiana bureau of statistics, remains with the people, and that the proper interpretation and construction to be given to § 1, Art. XV is that state officers shall be chosen by the electors of the state in such manner as may be prescribed by law, and that it is the duty of the legislature in creating a state office to fix the term of the office and provide for the election of the officer by the people." "The conclusion we reach is that the general assembly had no power to elect the appellee to the office in question, and that such election was void; that the information alleges there was a vacancy in the office; that the appellee usurped the office, and illegally held possession of it; that the governor appointed the relator, and he was eligible and is entitled to the office."

Elliott, Ch. J., and Mitchell J., dissented.

Substantially the same questions arose in *State* v. *Gorby*,[1] and the same conclusion was there reached. One extract only from the opinion will be given:—

"It is urged," said the court, "that in the absence of some express statutory or constitutional provision, the governor of the state cannot fill an office by appointment. We have no doubt that the general assembly may, in certain cases, create an office, and provide by law that it shall remain vacant until some future time; but such is not the case before us. When an office is created, to be filled immediately, the presumption must be indulged that the authority creating such office was satisfied that there was a public necessity for the office. If no legitimate mode is provided for filling the same, it is vacant the moment the law takes effect by which it is created. The constitution provides that the governor shall see to it that the laws are faithfully executed. The law abhors a vacancy in a necessary office; and under this constitutional provision, we think the governor not only has the right to fill all vacancies in state offices, where no other legal mode is prescribed, but that it is his duty to do so, to the end that the law prescribing the duties of the incumbent of the office may be faithfully executed. If it were not so the public would suffer, and the governor would be without the power of performing this constitutional obligation."

The constitution however seems to expressly confer upon the governor the power to fill vacancies and what was here said may have been said in view of this constitutional provision.

In 1891 the legislature of Indiana passed an act abolishing the office involved in the case of *State* v. *Hyde*,[2] above referred to, created a new office to be known as the office of state supervisor of oil inspection with duties substantially similar to those of the old

[1] 122 Ind. 17.

[2] 121 Ind. 20.

office, and provided that the incumbent should from time to time be appointed by the state geologist. The latter made an appointment, but the governor, claiming that the power of appointment belonged to him, also made an appointment. The governor's appointee sought to oust the appointee of the state geologist.[1] It was conceded that the legislature could not appoint, and it was contended by the relator that the power of appointment was so intrinsically an executive function that it could not be vested elsewhere than in the governor. This was a new aspect of the question, but the court unanimously sustained the appointment made by the state geologist, saying:—

"The solution of the question presented for decision depends upon the nature of the office and the construction to be placed upon this provision of our state constitution. The office is not an administrative state office, whose incumbent is charged with the administration of a separate department of the state government. The duties to be performed are such as pertain purely to the police. It is an office, therefore, which may be filled by appointment, and as the appointment of the incumbent is not provided for in the constitution, the case falls clearly within the provision of § 1, Art. XV. That section applies to such officers only as may be appointed, and for whose appointment no provision is made by the constitution. As the incumbent of the office in question may be appointed, and as no provision is made in the constitution for his appointment, the general assembly has the power to provide by law for the manner of his selection. It has the power to provide that such office shall be filled by popular election, or that it shall be filled by appointment. While the appointment to office is, generally, the exercise of an executive or administrative function, we do not think it must, of necessity, be made by the chief executive, for by the terms of § 1, Art. III of the constitution, the executive department of the state includes the administrative. Of course it was not the intention that any administrative state officer should perform any duty properly and necessarily belonging to the governor of the state, but it was, we think, the intention that such officers should have the power to perform such duties as should be required of them by law, in the administration of the state government where such requirement in no wise conflicted with the powers delegated to the governor alone. The appointment to office being generally the exercise of an executive or administrative function, the power must be conferred upon some executive or administrative officer, but the state geologist is an administrative state officer, elected by the people. The appointment to the office in controversy here by the state geologist is certainly a manner or mode of selecting an officer for whose appointment no provision is made by our constitution. Nor does such mode of selection in any manner infringe upon the prerogatives of the governor of the state."

In 1895, the legislature passed an act providing that the governor, auditor, treasurer, secretary of state and attorney general should constitute a board for the selection of prison directors. A majority

[1] State *v.* Hyde, 129 Ind. 296, 28 N. E. Rep. 186, 13 L. R. A. 79.

of this board made an appointment, but the governor, claiming that he had the sole power to appoint, made a different appointment, and the question arose as to the validity of his act.[1]

The position of the governor was that *all* of the appointing power was necessarily vested in him, and that it could not be conferred upon the board in question, nor could he be required to permit any of the administrative officers of the state to join with him in making the appointment. The court unanimously rejected his contention, and sustained the appointment by the board. The reasoning of the court in brief was that, under the practical construction of the constitution, the appointment of prison directors was not entrusted to the governor alone; that the appointment might have been made by the legislature directly, or the legislature might determine the manner of appointment; and that in prescribing the manner, there was no objection to providing for an appointment by a board as well as by the governor alone.

The court said:—

"The contention that the association with the governor of administrative state officers, in the duty charged by the law in review, infringes his prerogative as the executive head of the state, rests upon the proposition that the power of appointment, in this instance, is an executive function. We should not incline to the view that, if an executive function, the duties and responsibilities attending the exercise of that function could be shared by administrative officers. But, as we have shown, that is not the case before us. Nor do we find it necessary to our conclusion that, while by constitutional permit the appointment may be made directly by the general assembly, it *must* be done so, for, by the plain language of the constitution, the manner is a matter of choice by the general assembly. This choice is not embarrassed by limitations or conditions, and to render it invalid it must be so exercised as to confer it upon some one or number incapable of its performance.

"There is no expressed inhibition of our constitution to the discharge of this duty by executive or administrative officers, or by both classes of officers. It is the constitutional theory of our form of government . . . . that the relation of the executive and the administrative subdivisions are not to be so separated as to deny to the former all participancy in the affairs of the latter. Not only is there no express inhibition against the association of the governor with administrative state officers, in the discharge of any duty not involving powers and privileges delegated by the constitution to either alone, or to some other department of the government, but in our opinion, such association is proper and within the spirit of the provisions of the constitution just referred to."

In 1897 arose the question of the right to confer upon judicial officers the power to appoint officers not wholly judicial in their

[1] French *v.* The State, ex rel. Harley, 141 Ind. 618, 41 N. E. Rep. 2, 29 L. R. A. 113.

character. Legislation providing for the opening and laying out of streets confided the question of the assessment of damages and benefits to five persons called "city commissioners," appointed by the judge of the circuit court of the county. This legislation was attacked on the ground that it violated the constitutional provision respecting the distribution of powers.[1] The legislation, however, was sustained on two grounds:—

"It is not a function of the executive or legislative department of the state government to appoint city commissioners, and when a circuit judge appoints city commissioners, he is not exercising any function of either of said departments. Neither are the city commissioners, when appointed, a part of either the executive or legislative department of the state government, nor do they exercise any of the functions of either of said departments. While the city commissioners do not constitute a court, yet, their duties are quasi judicial, and their powers have been likened to the powers and duties of an *ad quod damnum* jury, *Elkhart* v. *Simonton*, 71 Ind. 7, 21. Their powers and duties are more of a judicial than an executive or administrative character. The appointment of city commissioners is not a judicial act. A judicial officer may, by authority of law, perform other than judicial acts; but when performed they do not become judicial because they were performed by a judicial officer."

"Moreover, said acts of the legislature certainly present a case of practical construction of the constitution upon the question raised. For over forty years this practice adopted by the legislature has been continued and acquiesced in by all the departments of the state, and a disregard thereof by the court, at this time, might destroy titles, impair the obligations of contracts, and do much mischief. Under the doctrine of practical construction, it would seem that the questions presented concerning the appointment of city commissioners by a judge should be regarded as settled."

And finally, in 1900, the court was called upon to decide whether the power to appoint certain officers might be confided to one who was not an officer at all in any department, or, specifically, whether the power to appoint members of the state board of examiners in dentistry could be conferred upon the state dental association, a private corporation existing under the laws of the state. This question was answered in the affirmative.[2] Two reasons were relied upon:—

"While it has been many times decided by this and other courts that, as a general rule, the power of appointment to office is an appropriate executive prerogative, yet, as said by Mitchell, J., in *Hovey* v. *State*, 119 Ind. 401, 'It is a fundamental error to assume that the exclusive right to exercise the power of appointment is included in the general grant of power to the execu-

[1] Terre Haute v. Evansville, etc., R. C. 149 Ind. 174, 46 N. E. Rep. 77, 37 L. R. A. 189.

[2] Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L. R. A. 748.

tive.' In the distribution of governmental power the people had the undoubted right to lodge any part of it where it pleased them, and when expressly placed the court will suffer no encroachment upon it by those acting in another department; but where the constitution is silent and the question is one of public policy, or relates to the best means or agency for the attainment of some governmental end, it must be presumed that the framers of the constitution intended to invest the legislative body with a large discretion in the selection of the agencies most suitable and beneficial to the public."

"For many years state officers, or officers performing state functions, have been chosen by private corporations under legislative authority, without question."

The effect of these holdings of the Indiana court, if they are capable of being reconciled, may, perhaps, be summarized as follows: (1) Permanent local appointments cannot be made by the legislature. (2) The legislature has no general appointing power, and, in general, the power to appoint inheres in the executive. (3) Practical construction has given the legislature the power to appoint officers of state institutions. (4) Administrative state officers must be elected. (5) The power to appoint inferior administrative officers may be conferred upon superior administrative officers other than the governor. (6) Where the legislature has power to direct the manner of making appointments, it may direct that they shall be made by a board consisting of the governor and other state officers; or even by a private corporation.

Kentucky also has recently had an interesting experience with this question. Under a constitution containing the usual distribution of powers and an express prohibition against the exercise by one department of powers belonging to another, the legislature passed an act providing for a board of commissioners of the penitentiary to be elected by the legislature. There had previously been a number of cases in that state in which it had been said that the power to appoint to office is intrinsically an executive function,[1] and the validity of this legislation was attacked in 1898 in the case of *Sinking Fund Commissioners* v. *George*.[2] The court, however, referring to two other instances in which the legislature had elected officers, held that "the election of the commissioners was not essentially an executive function, and that the legislature had the right to elect them."

This conclusion did not long remain unchallenged. In 1898, the

[1] See Taylor *v.* Commonwealth, 3 J. J. Marsh, 401; Justices *v.* Harcourt, 4 B. Mon. 500; Gorham *v.* Luckett, 6 B. Mon. 159; Applegate *v.* Applegate, 4 Metc. 237.

[2] 104 Ky. 260, 47 S. W. Rep. 779.

legislature passed an act creating a state board of election commissioners, to be elected by the legislature. In *Pratt* v. *Breckinridge*,[1] an election contest resulting from a decision of this board, the validity of the act creating it was assailed for various reasons, and among these for the reason that the election of the board by the legislature involved an encroachment upon executive power. A majority of the court sustained this contention, citing and relying upon the Indiana cases already reviewed. It could not be contended, said the court, that the board was a mere legislative agency, and thus within the conceded power of the legislature to appoint such inferior officers as are necessary to enable it to execute its appropriate functions. The election could only be sustained upon the ground that the legislature had general power to appoint or elect state officers to fill offices created by it. This contention can not be sustained:—

"The creation of an office is accomplished by the exercise of legislative power. It is done by the enactment of a law. The filling of it, when not exercised by the people, or in some manner directed or permitted by the constitution, is executive, and must be performed by an executive officer. . . . The legislature has no more power to elect or appoint such officers than it has to enact a law providing the judgment to be entered in a pending litigation."

Three judges dissented, deeming the question settled by the previous decision in *Sinking Fund Commissioners* v. *George*,[2]—a decision "in accord with the great weight of authority and the settled practice in this state long recognized by this court." A vigorous application for rehearing was subsequently denied.[3]

Passing now to the cases in states other than Indiana and Kentucky, one of the earliest is that of *Mayor of Baltimore* v. *State*,[4] which involved the right of the legislature to appoint police commissioners for the city of Baltimore. It was urged that the clause in the constitution making the usual division of powers operated to prevent the legislature from exercising such an executive power as the appointment to office. But the court replied:—

"We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense in which we understand the position to have been taken; namely, that it is inherent in, and necessarily

[1] (1901) — Ky. —, 65 S. W. Rep. 136.

[2] 104 Ky. 260, *supra*.

[3] Pratt *v.* Breckinridge, 66 S. W. Rep. 405.

[4] 15 Md. 376, 74 Am. Dec. 572 (1860).

belongs to, the executive department. Under some forms of government, it may be so regarded, but the reason does not apply to our system of checks and balances in the distribution of powers, where the people are the source and fountain of government, exerting their will after the manner, and by instrumentalities specially provided in the constitution."

It appeared however, that the constitution provided that the governor should have the appointment of all officers "unless a different mode of appointment be prescribed by the law creating the office;" and the court held that this provision would authorize the legislature to direct that the appointment should be made by itself. Importance was also attached to the long practical construction which had been put upon the constitution in this respect from the time of the organization of the state.

In California the question has been several times before the court. In the most recent case, *People* v. *Freeman*,[1] the point was whether the legislature might elect the trustees having control of the state library. The constitution contained the usual clause distributing powers, and also declared that all officers not therein provided for should be elected or appointed as the legislature might direct. The contention here, as in the other cases, was that appointment was an executive act and could not therefore be exercised by the legislature. It appeared that the power of the legislature to appoint had been recognized and upheld under a previous and similar constitution, and had been often exercised. After discussing some of the cases holding the function to be executive, and quoting the opinion of Thomas Jefferson already referred to, the court said:—

"No doubt these views as to the intrinsic nature of the power of appointment or of nomination to office, and the expediency of confining it to the executive department of the government, are entitled to the highest consideration, but the question here is, not what the constitution *ought* to be, but what it *is*, or in other words, what was the intention of its framers as to this particular matter. Of course, if there had been at the time of its adoption a general consensus of opinion in harmony with the views of Mr. Jefferson, as above quoted, we should be forced to conclude that its framers intended to forbid to the legislature the exercise of the power of appointment to office. But there is no such consensus of opinion. On the contrary, it had not only been decided in other states of the Union, under constitutions containing provisions substantially equivalent to the sections above quoted from our own, that the legislature could fill offices by itself created, but our own supreme court, construing identical provisions of our old constitution, had come to the same conclusion: *People* v. *Langdon*, 8 Cal. 16. In view of this construction, so long acquiesced in and acted upon, it must be held that the conven-

[1] 80 Cal. 233, 22 Pac. Rep. 173, 13 Am. St. Rep. 122.

tion of 1879, in re-adopting the provisions so construed, in the identical terms of the old constitution, intended that they should have the same operation and effect formerly attributed to them. If they had meant to prescribe a different rule, it would have been easy to express such intention in language not to be misunderstood, and leaving nothing to construction.

"Upon these considerations we feel constrained to hold that the power of appointment to office, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and if the law so prescribes, may be exercised by the members of the legislature."

In Oregon, also, it has been held[1] that the power of appointment is not necessarily an executive function and that the legislature may therefore properly confer upon the judges of the circuit court the power to appoint officers having no connection with its judicial duties, such as the members of a bridge commission; and that the legislature itself may appoint such officers as railroad commissioners.[2]

So, in Illinois, it has been held that the power to appoint to office is a *political* function, not necessarily included in any one of the three branches of government as recognized by the constitution, and therefore that the power to appoint such municipal officers as a board of park commissioners may lawfully be conferred upon the judiciary.[3]

In Iowa, on the other hand, the court in a recent case[4] held that the power to appoint officers in no way connected with the exercise of judicial functions could not be conferred upon the judicial department under a constitution making the usual distribution of powers, and containing the usual prohibition of the exercise by one department of powers belonging to another. The court said:—

"Generally speaking appointment to an office is an executive function. True, not every appointment is executive in character, for appointments may be made by judicial officers in the discharge of their official duties, and the legislature may appoint the officers necessary to enable it to discharge its duties. But such appointments are necessary to enable them to properly discharge their duties, and to maintain their separate existence. These do not involve an encroachment on the function of any other branch. The appointments authorized by the act in question are in no manner connected with the

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[1] State *v.* George, 22 Oreg. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; State *v.* Compson, 34 Oreg. 25, 54 Pac. Rep. 349.

[2] Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115.

[3] People *v.* Morgan, 90 Ill. 558.

[4] State *v.* Barker (1902), — Iowa —, 89 N. W. Rep. 204. This case contains a very full citation of the authorities bearing upon the delegation of powers and duties to judicial officers.

discharge of judicial duties, and to our minds clearly fall within the prohibition of the article of the constitution hitherto quoted."

In North Dakota views more nearly resembling those prevailing in California, Oregon and Illinois have been expressed. Thus in *State* v. *Boucher*,[1] the court said:—

"A careful study of all authorities to which we have been cited and all that we are able to find, has made it entirely clear to each member of this court that the power of appointment to office does not necessarily and in all cases inhere in the executive department, and that when, as in this state, the express provisions of the constitution vest in the governor a limited power of appointment, such grant is exclusive, and no other or greater appointing power can be exercised. It is different with the legislative department. It is conceded in the brief of counsel that, by the great weight of authority, constitutional provisions are in the nature of grants of power to the executive and judiciary, but are limitations upon the power of the legislature. This is no doubt true. All governmental power not by the constitution lodged elsewhere resides in the legislature."

In Alabama also the matter has lately been exhaustively considered.[2]

A single paragraph will show the conclusion of the court:—

"Wisdom has dictated that particular offices be filled exclusively by appointment of some governmental agency other than the vote of the people themselves, and this, and the agencies for such appointments, and the methods of filling vacancies in offices elective by the people, have been expressly manifested and prescribed in our constitutions or laws. It was necessary that they be so prescribed, for otherwise the right of such appointment resided nowhere; it belonged to no department of the government. With us, the governor has no prerogatives. He must find warrant in the written law for his every official act. He has no more power to appoint officers, when not expressly conferred, than has the president of the senate, who is of the legislative, or the chief justice of this court, who is of the judicial department; and when we go back to our constitution and laws in this state, from the beginning of the state government to the present, we find it has been the policy to distribute this appointing power among the several departments of the state. We need not specify. The instances will readily occur to the minds of those familiar with the constitution and the laws. It may be true that the governor has been invested with the greatest share of this power, but no principle or policy has been declared that the power inherently belongs to him. And we may remark that the fact that all our constitutions, in assigning appointive power to the governor, have specifically designated the particular officers to whom it applied, furnishes cogent argument that the people did not regard the power as necessarily or inherently belonging to him."

In California and New York the courts have gone still further

[1] 3 N. Dak. 389, 56 N. W. 142, 21 L. R. A. 539.

[2] Fox v. McDonald, 101 Ala. 51, 13 South. 416, 21 L. R. A. 529, 46 Am. St. Rep. 98.

and held that the power to appoint certain classes of officers, such as a board of fire commissioners, or commissioners of pilots, may be conferred upon such non-official associations as the board of fire underwriters[1] or the chamber of commerce and the presidents and vice-presidents of marine insurance companies.[2] That some of the members of the appointing board were not even citizens was held in the California case to be immaterial.

In North Carolina where the constitution expressly authorizes the legislature to appoint certain officers, it is held to be clear that the power to appoint cannot be regarded as exclusively executive.[3]

The question of the location of the appointing power has but recently been decided in Michigan, though there had previously been several expressions of judicial opinion upon it. In *People* v. *Hurlbut*,[4] heretofore referred to, the legislature had passed an act establishing a board of public works for the city of Detroit, and had named the first members of the board in the act itself. The case, as will be recalled, was decided upon the ground that the act violated the right of local self-government, and was therefore void; but the objection was raised in argument that the legislature had not the power to appoint to office, and three of the judges expressed opinions upon it.

Judge Christiancy discussed the question with most fullness. He said:—

"This view of the nature of legislative power, as urged by the counsel for the respondents, struck me at first with considerable force; but reflection and further examination have satisfied me that, though true as to the great mass of legislative power—that which is most broadly distinguished from both judicial and executive—yet it does not include the whole field of what is generally recognized as legislative power, not only in England, but in most of the states of the union. Besides the power to make general rules for the government of officers and persons and regulating the rights of classes of persons, or of the whole community, there is a large class of powers recognized as legislative, occupying an intermediate space between those general rules and regulations, and those of a judicial character on the one side, and executive on the other, and which are not, and cannot be, marked off from these by any clear and palpable line. . . . And as the legislature represents the public interest, and has full control of all municipal organizations, as instrumentalities of government, I see no reason to doubt their power of creating such offices as they may think the public interest requires, or of filling them with such per-

[1] In re Bulger, 45 Cal. 553.

[2] Sturgis v. Spofford, 45 N. Y. 446. See also People v. Woodruff, 32 N. Y. 355.

[3] Cunningham v. Sprinkler, 124 N. C. 638, 33 S. E. Rep. 138.

[4] 24 Mich. 44, 9 Am. Rep. 103.

sons as they choose to designate in the act, except as that power is restrained by some provision of the constitution. This course of legislation may not be wise or politic; but as a question of power, I think the legislature possesses it, with the limitations above mentioned. . . .

"As to this mode of appointment being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power cannot always be defined by any fixed standard in the abstract. What would come within the executive power in our form of government, would fall within the legislative in another, and vice versa. The question here is, whether, under our constitution, it is executive or legislative; and as the constitution has not confided the appointment of these or the like officers to the executive authorities, and has left it to the legislative discretion whether to create such offices, and how they shall be filled, it cannot be truly said that such an appointment is any more in the nature of the exercise of an executive than of a legislative power."

Judge Campbell, after holding that § 14 of Art. XV. of the constitution referred only to municipal officers, said:—

"If there is any restriction on the power of the legislature over officers not municipal it must be found elsewhere. And, there being no express provision on the subject, any such limitation must be found in some manifest implication. The only one which has been thought of, is that which rests in a supposed distinction between the legislative and executive powers concerning appointments to public trusts. These powers have been kept separate with some jealousy, and for very good reasons. The courts are bound to prevent encroachments by one upon the other, when they are evident. But the line is not so clearly drawn as to be free from doubt, and so far as practical construction goes under the old constitution, it must have weight in construing the present one. The language of both instruments concerning the distinction of powers is substantially identical. While, under the old constitution appointments to office were generally by the executive, there are many instances of state boards and agencies named, in the first instance, by the legislature where the governor had no voice in the first selection beyond his part in approving the statute making the appointments. The practice is not in harmony with the general theory of the constitution, and if the governor should object to the persons named, I am not prepared to hold that his objections could be overruled by a two-thirds vote, as they might be if directed against the body of the statute. When such a case arises, I think the point worthy of consideration."

Precisely what Judge Campbell meant by this is not very clear, and the logical conclusion from his language would seem to be that appointments could not be made without the governor's consent.

Judge Cooley contented himself with saying:—

"Nor do I think the appointment of the first members of the board of public works is necessarily void as an exercise of executive authority. There is no such thing as drawing between legislative and executive power such a clear line of distinction as separates legislative from judicial; and the legislature, in prescribing new rules, have necessarily a large discretion as to whether the

agencies for putting them in force shall be named by themselves or left to the selection of the executive."

But in a note to his treatise on Constitutional Limitations, in commenting upon the claim that appointment to office is intrinsically an executive act, he had said:

"In a certain sense, this is doubtless so, but it would not follow that the legislature could exercise no appointing power, or could confer none on others than the chief executive of the state. Where the constitution contains no negative words to limit the legislative authority in this regard, the legislature, in enacting a law, must decide for itself what are the suitable, convenient or necessary agencies for its execution, and the authority of the executive must be limited to taking care that the law is executed by such agencies."

In the late case of *Attorney General* v. *Bolger*,[1] however, the question arose whether the power to appoint municipal officers could be conferred upon the municipal legislature and the court, approving the rule laid down by Mr. Justice Christiancy in *People* v. *Hurlbut*, held that the power to appoint municipal officers was not so inherently executive in its nature that it could not be confided to the common council. The court said:—

"The constitution does not provide, either directly or indirectly, the manner in which city and village officers shall be appointed. It follows that the right to appoint them is not inherent in the executive or any other branch of the city government. That question is left to the discretion of the legislature to determine which branch of the local government shall exercise the power of appointment."

No one can investigate this question without being strongly impressed with the conviction that the weight of opinion both among statesmen and judges is that the power of appointing to public office, as a matter of public policy, ought not to be regarded as a legislative function. And in Ohio, the constitution has expressly forbidden its exercise. No one, however, can escape the conclusion that, by the weight of judicial opinion at the present time, outside of Indiana and Kentucky certainly, if not by the majority of the decided cases, it is not exclusively or necessarily an executive function; that, where the constitution is otherwise silent, the usual division of powers is not conclusive of the matter; and that the legislature may not only create offices but may also fill them itself, or may commit the power of appointment to such officers or agencies as it may deem proper to select.

Whether this is to be regarded as an evil, it is not the present purpose to inquire; that the power exists, as a matter of law, seems reasonably assured from the authorities which have been reviewed.

FLOYD R. MECHEM

[1] Attorney General v. Bolger, 128 Mich. 355.